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No. 856

IN THE

Supreme Court of the United States

OCTOBER TERM .....

WILLIAM H. JEFFERSON,

Petitioner,

v.

TAIYO KAIUN K. K., ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Houston 2, Texas

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No.....

In The

Supreme Court of the United States

October Term .....

William H. Jefferson,

Petitioner,

v.

Taiyo Kaiun K. K., et al.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William H. Jefferson prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I.

OPINIONS BELOW

No written opinion was rendered by the United States District Court for the Southern District of Texas, Galveston Division. The judgment of the trial court is printed in the Appendix (App. 1a). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 310 F. 2d 582 (App. 3a).

II.

JURISDICTION

The opinion of the Fifth Circuit was handed down on November 28, 1962.

The jurisdiction of this Court is conferred by 28 U.S.C.A. Sec. 1254.

III.

QUESTION PRESENTED

Is the flooring in the hold of a vessel unseaworthy as a matter of law, if it caves in during the course of ordinary and customary use?

IV.

STATEMENT OF THE CASE

Petitioner is a longshoreman. On January 31, 1959, he and other longshoremen were dispatched to the Number 5 Hatch of the SS TAITEX MARU for the purpose of loading the vessel with cargo. The men first loaded the after end of the Number 5 upper hold with sacks of flour, and then they proceed to the forward end of the Number 5 lower hold (R. 24, 150, 177). Upon entering the lower hold, the longshoremen found already stowed a layer or tier of barrels with a dunnage flooring laid out on the barrels (R. 28-30, 175). The evidence is somewhat in conflict as to whether the dunnage was laid as a solid flooring or whether it was laid in strips (R. 107, 152, 181); but, at all events, the witnesses agreed that the dunnage completely covered all the openings between the barrels (R. 105, 152, 180). Since the longshoremen were necessarily required to work on top of the dunnage, using it as flooring, several of them, including Petitioner, examined the dunnage to determine that it

was sturdy and properly laid. In so doing, they did not pick up and inspect each and every piece of dunnage, but the flooring looked to them as if it was safe to work on, even though the dunnage was old and appeared worn (R. 31-32, 173, 179).

A cotton gang is usually composed of fifteen men; two operate finger-lifts, bringing cotton from the warehouse to the ship side; two are used as hook on men who put a sling around the cotton and make it fast; two are winch operators; one of the gang acts as a signal man; and eight work in the hold of the vessel. The eight men in the hold are separated into two groups; four work on the offshore side of the vessel, and four on the inshore side. After the cotton is lowered into the hold, the inshore gang releases the sling, generally holding three bales, and, by rolling the bales to the proper place, the men stow the cotton on the inshore side of the vessel. While this is done, another sling of three bales is lowered into the hold, and these, in turn, are stowed by the four men working the offshore side of the vessel.

On the day in question, Petitioner was a member of the gang working the off-shore side of the Number 5 lower hold. The second sling of cotton was stowed without incident, but while Petitioner's gang was stowing the fourth or sixth sling of cotton and while Petitioner was "cutting" a bale (directing its roll toward the area where it was to be stowed), a piece of dunnage on which Petitioner stepped suddenly and unexpectedly broke and caved in. Petitioner's right leg was caused to go through the flooring, in between an excessive opening between barrels, and the bale of cotton fell over on him, injuring his back and leg (R. 36, 152, 184).

After Petitioner was freed, the broken piece of dunnage was examined by several of the longshoremen and found to have a large knothole in it at the place where it broke

(R. 154, 186). This piece of dunnage was replaced, and the remaining longshoremen finished loading the hold (R. 166). Petitioner was relieved from working in the hold, and he finished his time as a winch operator. And since that time, Petitioner's injuries have prevented his return to full time longshore work.

The above facts are established by the testimony of Petitioner and two disinterested witnesses called by him at the trial.

In addition, Petitioner's witnesses testified without contradiction that the purpose of dunnage like that which broke is (1) to separate layers of cargo and (2) to provide a flooring for the longshoremen to work upon (R. 34, 106, 117, 128, 159-160, 181-182). Further it is unchallenged that Petitioner was engaged in the proper and customary performance of his job when the flooring broke and caved in (R. 124-125, 140-141). To be sure, not only Petitioner's weight but also some portion of the weight of the bale of cotton (a bale weighs between 500 and 750 pounds) was on the piece of dunnage when it gave way; however, the evidence makes clear that there is no way to stow cargo of this type except for the longshoremen to roll the bale along the floor and to occasionally "coil" the bale for direction and necessarily the longshoremen and the flooring will always be bearing some portion of the weight of the bale.

Finally, it is undisputed that the dunnage flooring on top of the barrels was already laid when the longshoremen went down into the Number 5 lower hold. That is, these longshoremen were supplied by the shipowner with dunnage in place, i.e., flooring.

The Respondent shipowner offered no defense in this case; rather it strenously contended that the flooring had not caved in and that Petitioner had been injured when

he slipped and fell for no apparent reason. To this end, it introduced evidence that Petitioner had not told the time keeper that he was injured by the breaking of a dunnage board. This done, the shipowner rested its case.

The controversy was submitted to the jury on special interrogatories. The first inquiry was whether the facts were as testified to by Petitioner and his disinterested witnesses, or whether the Respondent was correct in its assertion that nothing done by it had caused Petitioner's injury. Thus, the jury was asked whether Petitioner had been injured by reason of the breaking of a dunnage board. The jury found that the facts were as stated by Petitioner.

The second interrogatory propounded to the jury inquired whether the piece of dunnage which broke was unseaworthy. To this, the jury responded that the board was seaworthy, and, on this finding, judgment was entered for Respondent.

It has been Petitioner's position throughout this litigation that the piece of dunnage flooring was unseaworthy as a matter of law, since the evidence was undisputed and uncontradicted that the board had caved in while being put to ordinary and customary use. This precise point was raised by Petitioner in his motion for directed verdict (R. 236-237) (App. 6a) and motion for judgment n.o.v., (R. 350) (App. 7a) before the Trial Court, and was Petitioner's sole point of error in the Court of Appeals (App. 9a). Jurisdiction of the trial court is grounded on diversity of citizenship.

V.

REASONS RELIED ON FOR GRANTING THE WRIT

This petition raises a question of substantial importance in regard to this much litigated area of the maritime law.

Indeed, the decisions of the two lower courts in this case have effectively eradicated the prior pronouncements of this Court in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944) and *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396 (1954), affirming *per curiam*, *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9th Cir. 1953). The point here presented was specifically ruled on in the *Mahnich* case. There a staging rope broke while being put to ordinary use, causing Mahnich to fall and be injured. Both lower courts had found no unseaworthiness on the theory that good rope had been available for use and that this was the extent of the shipowner's obligation. The Court deemed this an erroneous view of the law. But rather than reverse and remand for a new trial, the Court decided the unseaworthiness question as a matter of law:

> "After the accident, examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it. * * * The staging from which petitioner fell was an appliance appurtenant to the ship. *It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used*, because of the defective rope with which it was rigged. *Its inadequacy rendered it unseaworthy*, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness." 321 U.S. at 103 (Emphasis added).

In *Alaska S.S. Co.* v. *Petterson*, the District Court had made a finding that a block which had been brought on board the vessel by longshoremen was not unseaworthy, even though it had broken while being put to ordinary use. The Ninth Circuit reversed the lower Court's legal deter-

mination that the shipowner was not responsible for equipment not supplied by it, but the appellate court did not remand the case for a new trial; it, as this Court had done in the *Mahnich* case, decided the unseaworthiness issue:

> "The owner contends that as there was no proof of the unseaworthiness of the block, Petterson cannot recover. The Court below found that the block was used 'in a customary and usual manner' and that it was 'of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question. * * * If the block was being put to a proper use in a proper manner * * * it is a logical inference that it would not have broken unless it was defective — that is, unless it was unseaworthy." 205 F. 2d 479.

And judgment was entered for the Libellant." Certiorari was granted, and the decision expressly affirmed, 347 U.S. 396 (1954).

The books abound with authorities demonstrating and adhering to these decisions. See, e.g., *Blanco* v. *Phoenix Co.*, 304 F. 2d 13, 14 n. 3 (4th Cir. 1962) (Defective boom pin; summary judgment for seaman affirmed); *Van Carpals* v. *THE SS AMERICAN HARVESTER*, 297 F. 2d 9 (2nd Cir. 1961) (Defective valve; court reversed a finding by the judge of seaworthiness); *Vega* v. *Maluda*, 291 F. 2d 415, 419-20 (5th Cir. 1961) (Defective block; a case of "patent unseaworthiness"); *Wing* v. *Rockport S.S. Co.*, 1962 A.M.C. 2601, 2603-04 (W.D. Mich. 1962) (Defective boom; instructed verdict on unseaworthiness should have been given); *Cashon* v. *Stockard S.S. Co.*, 173 F. Supp. 845, 849 (E.D. La. 1957) (Defective boards; unseaworthy).

So too here, the dunnage was defective and thus unseaworthy.

Perhaps the determinative question is whether it makes a difference that a jury has found the board to be sea-

worthy. Petitioner respectfully urges that it does not, and should not, make a difference. The function of the jury in our jurisprudence is to act as the fact-finder. Where the facts are in dispute, the jury is charged with the responsibility of resolving the controversy. However, it has never been thought that the jury can disregard the undisputed and unimpeached testimony of disinterested witnesses, or that it can find facts that are wholly unsupported by any evidence. But this is exactly what the jury had to do here in order to conclude that the board was seaworthy. This Court has expressly ruled that undisputed evidence may entitled a Plaintiff to an instructed verdict. *Delaware, L. & W. R. R. v. Converse*, 139 U.S. 469 (1891). The matter is summed up by the Supreme Court of South Dakota as follows:

> "The positive testimony of disinterested, uncontradicted witnesses cannot be arbitrarily or capriciously disregarded by the jury." *Jerke v. Delmont State Bank*, 54 S.D. 446, 223 N.W. 585 (1929).

See also, 9 Wigmore, Evidence, Sec. 2495 (3rd ed. 1940).

The Court of Appeals summarily disposed of this case by saying that there was a view of the evidence which supported the jury's finding. However, the court did not say what that view was. Indeed, it is respectfully submitted that the Court of Appeals could not have found such a view of the evidence, even if it had tried.

Respondent, apparently relies solely on the fact that there is evidence that some of the dunnage in the lower hold of its vessel was only a quarter inch thick and, therefore, not suitable to walk on. It concludes from this that dunnage is not meant to be walked on and that this is a rational explanation of the jury's finding. However, the

assertion overlooks two factors. First, it is not disputed by the shipowner that the dunnage board which broke was of the thicker variety and intended to be walked on. And second, since there was no way to stow the cotton without walking on the flooring, the shipowner was charged absolutely with the duty to supply a flooring suitable for that purpose. E.g., *Mesle* v. *Key S.S. Corp.*, 260 F. 2d 747, 750 (3rd Cir. 1958); *Poignant* v. *U. S.*, 225 F. 2d 595 (2nd Cir. 1954); *Thompson* v. *Erie R.R.*, 1962 A.M.C. 2605, 2615, 33 Misc. 2d 514, 227 N.Y.S. 2d 80 (1962). Consequently, by supplying quarter inch dunnage, the shipowner merely magnified its default.

The shipowner's *real* contention in this case has been that the holdings of this Court in *Mitchell* v. *The Trawler Racer, Inc.*, 362 U.S. 539 (1960) and *Morales* v. *City of Galveston*, 370 U.S. 165 (1962), are calculated to make every question of unseaworthiness one for the jury. It argues that a defective appliance of a vessel may give way during ordinary use and yet be seaworthy, if a jury finds it so. Petitioner can only say that such an argument lies in the teeth of this Court's specific holding in the *Mahnich* case.

Finally, the shipowner has made the vague contention that the jury's finding of seaworthiness may be predicated on the idea that the board would not have broken if the barrels underneath had been properly stowed snug up to one another. This is no doubt true. But it is also true that the shipowner did not simply supply dunnage boards to Petitioner and the other longshoremen; rather, the shipowner, or its servants or agents, undertook to provide Petitioner's gang with flooring, i.e., dunnage in place over the barrel-stow as it existed, not as it should have existed. The dunnage floor over the existing barrel stow as supplied to the Petitioner and his gang was warranted by the Respondent to be then and there seaworthy for the intended and

necessary purpose of walking and standing on it in loading cotton. In other words, the dunnage board in the floor that broke was intended and warranted to be suitable as a part of the floor on the barrel-stow as that stow existed under the flooring. It was not suitable. That the dunnage board might have been adequate and suitable under some other hypothetical fact situation is not at issue here. For example, if a ship's hull, built of defective wood, caved in from the force of a calm sea or the force of an ordinary storm, would the argument that the hull would not have caved in had the ribs of the ship been spaced closer together defeat a claim of unseaworthiness? Certainly not. Likewise, if a staging rope breaks during ordinary use, it is irrelevant that the rope would not have broken had the strain on it been less, and the rope is nonetheless unseaworthy.

The injustice in this case cries out for correction.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

MANDELL & WRIGHT

By .....
Attorneys for Petitioner
707 South Coast Building
Houston 2, Texas

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of ....., 1963, a true and correct copy of the foregoing was served upon Messrs. Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas, and Royston, Razor and Cook, San Jacinto Building, Houston, Texas, Attorneys for ....., by placing the same in envelopes addressed to each of them, postage prepaid, by certified mail, return receipt requested, and deposited in the United States mails.

.....

JUDGMENT OF THE TRIAL COURT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

(Caption — Civil Action No. 2738)
(Filed June 2, 1962)

BE IT REMEMBERED that on the 21st day of March, 1962, came on to be heard the above entitled and numbered cause and came the parties by and through their attorneys of record and announced ready for trial; whereupon a jury was duly empaneled and selected and after the parties proceeded to adduce their evidence from day to day, the parties all announced that they had rested their case and the cause, as between the plaintiff and defendant, was thereupon submitted to the jury on special interrogatories, in accordance with the Federal Rules of Civil Procedure.

The jury having retired to deliberate, thereafter returned with its verdict and answered that the plaintiff has sustained an injury to his back as a result of a dunnage board's breaking on defendant's vessel, but further found, in response to interrogatory No. 2, that the dunnage board in question was unseaworthy.

After the Court further noting that at the close of the evidence, plaintiff's counsel specifically announced to the court that he waived any contention of negligence in his suit, and further announced to the Court that he was not making any contention of unseaworthiness of the vessel in any particular, other than the dunnage board which broke at the time of plaintiff's accident, and was making no claim of unseaworthiness, because of the method in which the cargo aboard the vessel was stowed.

Accordingly, it appearing to the Court that the jury has expressly found that the dunnage board which broke was unseaworthy, and that plaintiff had waived all other basis for liability, whether by negligence or unseaworthiness, and that the defendant is, therefore, entitled to a judgment that the plaintiff take nothing, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that plaintiff, William Jefferson, take nothing against the defendant, Taiyo Kaium K.K., by reason of this suit, and it is, further,

ORDERED, ADJUDGED AND DECREED that the third-party action by the defendant, Taiyo Kaium K.K. against the third-party defendant, Suderman Stevedores, Inc., is rendered moot by reason of the entry of this judgment, the said third-party action is, therefore, dismissed without prejudice; and it is, further,

ORDERED, ADJUDGED AND DECREED that all costs of Court are taxed against the plaintiff, for which let execution issue in the event the same are not seasonably paid.

ENTERED AT Houston, Texas, this 30 day of May, 1962.

s James Noel
PRESIDING JUDGE

S Frank G. Harmon

Approved as to form:

s/ Mandell & Wright
By H. Wright

Approved as to form:

s/ Royston, Rayzor & Cook
By Bryan F. Williams

OPINION OF COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19971

WILLIAM H. JEFFERSON,

Appellant,

versus

TAIYO KATU'N, K. K. et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(November 28, 1962)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant brought an action against the owner of a steamship for damages claimed as a result of an injury he had received while working as a stevedore in the loading of the vessel. Suit was brought on the dual theory of negligence of the owner's employees and the unseaworthiness of the vessel. At the trial the claim of

negligence was abandoned. The appellant requested and the court refused to give an instruction that the vessel was unseaworthy as a matter of law. At the time of the injury the appellant was stowing cotton in one of the holds of the vessel and, with others of the crew, was walking upon dunnage laid upon barrels which constituted a part of the cargo. The district court propounded to the jury the question as to whether the appellant was injured by the breaking of a dunnage board, and the jury gave an affirmative answer. The next question put to the jury was whether the dunnage board was unseaworthy at the time of the appellant's accident. The jury answered that "it was seaworthy." Judgment was entered for the owner of the vessel on the special verdict of the jury and from that judgment this appeal has been taken.

The sole question for us to determine is whether, as a matter of law, the vessel was unseaworthy and the appellant was entitled to an instructed verdict on liability. It will be a rare case where the issue of unseaworthiness as the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law. Norris, Maritime Personal Injuries, 106-107, § 43. This is not such a case; and we do not think there would be any addition made to the jurisprudence in the field by a recital of the evidence. The Supreme Court, in discussing the setting aside of jury verdicts in cases involving the seaworthiness of a vessel by appellate courts, has said:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall otherwise be re-examined in any court of the United States, than according to the rules

of the common law.'" *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U. S. 355, 82 S. Ct. ...., 7 L. Ed. 2d 798.

The answers to the two interrogatories previously mentioned are not, on the record before us, inconsistent. The finding that the appellant's injury resulted from the breaking of a dunnage board does not require a finding that the vessel was unseaworthy. In the opinion from which we have quoted it is also said:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, supra.

We find no merit in the contention urged by the appellant. The judgment of the district court is

AFFIRMED.

MOTION FOR DIRECTED VERDICT

MR. WRIGHT: I had waited until after the jury left because I wanted to make a motion that the court instruct the jury, as a matter of law, that this vessel was unseaworthy. At least this area was unseaworthy. It seems to me that the doctrine of unseaworthiness is that one of two things must be true: Either the board was insufficient under the circumstances, or it was defective under the circumstances. Either one of which means that under the doctrine of absolute liability, liability exists. There is no other way that you can account for the board breaking except that it was either insufficient for the purpose, or it was defective for the purpose. Otherwise it would not have broken.

I therefore move the court to instruct the jury that they find liability as a matter of law.

MOTION FOR JUDGMENT N.O.V.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

(Caption — Civil Action No. 2738)
(Filed April 5, 1962)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WILLIAM H. JEFFERSON, Plaintiff in the above styled and numbered cause, and moves the Court to disregard the jury's finding in Question No. 2 as being contrary to the law and the evidence and to then enter a partial judgment herein on the remaining jury verdict fixing liability herein against the Defendant, Taiyo Kaiun K.K.; or, in the alternative, to enter a partial judgment herein fixing liability against the Defendant, Taiyo Kaiun K.K., notwithstanding the jury's finding in Question No. 2, such finding being contrary to the law and the evidence; and in either event granting Plaintiff a new trial on the issue of damages, and for such motion would respectfully show the Court as follows:

1.

In Question No. 1, the jury found Plaintiff suffered an injury on February 1, 1959, as a result of a dunnage board breaking.

a. A finding that the dunnage board broke is a finding that the board, being unquestionably used as was intended, was unseaworthy under the facts as proved.

b. The jury's answer is a clear finding of an injury.

c. A finding that Plaintiff was injured "as a result" of the dunnage board breaking is a finding that the breaking of the dunnage was a proximate cause or contributed to Plaintiff's accident.

Therefore, the jury's answer to Question Number 1 finds all the necessary elements to place liability on the Defendant Taiyo Kaiun K.K.

2.

Question Number 2 should not have been submitted to the jury, and Plaintiff timely objected to its submission.

a. There is no evidence to support the jury's answer thereto.

b. As a matter of law, the dunnage board that broke, under the circumstances of this case, was unseaworthy.

c. All of the evidence, without exception, shows:

(1) The dunnage board was intended to be walked on and worked on in loading cotton;

(2) Cotton was being loaded in the usual and ordinary way;

(3) The dunnage board was not reasonably suited for this usual and ordinary use to which it was being put, especially in view of the excessively large open area between the drums, which the dunnage board spanned or covered.

3.

Considering the jury's answer to Question No. 1, the evidence is undisputed that, and as a matter of law, the breaking of the dunnage board was a proximate cause or contributed to Plaintiff's injury on February 1, 1959.

WHEREFORE, Plaintiff prays that judgment be entered herein fixing the liability of the Defendant, Taiyo Kiaun K.K., to the Plaintiff for damages, the amount thereof to be determined on a new trial, based on the verdict of the jury, disregarding the jury's answer to Question No. 2, or, alternatively, based on the finding of the jury in Question No. 1, and notwithstanding the answer of the jury to Question No. 2, and for such other and further relief to which Plaintiff may show himself entitled in the premises.

MANDELL & WRIGHT

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POINT OF ERROR IN COURT OF APPEALS:

An appliance of a vessel which does not hold up under ordinary and customary use is unseaworthy as a matter of law. The Trial Court therefore erred in failing to enter judgment on the question of liability in favor of Plaintiff and against the Defendant.

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OCTOBER TERM, 1962

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WILLIAM H. JEFFERSON,

Petitioner,

v.

TAIYO KAIUN K.K., ET AL.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Will the protection of the Seventh Amendment be denied to respondent?

2. Will the Supreme Court redetermine facts found by a jury?

3. Will the Supreme Court redetermine facts found by a jury and concurred in by the District Court and the Court of Appeals?

STATEMENT OF THE CASE

The petitioner, a longshoreman by profession, was injured on board respondent vessel. After recovering compensation under the federal Longshoremen's and Harbor-

workers' Compensation Act, the petitioner instituted suit against the vessel alleging various acts of negligence and unseaworthiness. However, during the trial the petitioner expressly waived and abandoned any contention of negligence and any contention with regard to the vessel's duty to furnish a safe place to work (Tr. 213, 356-357). The petitioner also insisted that consideration of the issue of seaworthiness be limited to one particular piece of dunnage board (Tr. 244-245, 248)[1].

The petitioner had elected trial by jury (Tr. 366). The jury, under a charge fashioned at the instance of the petitioner, (Tr. 248) found that there was no unseaworthiness (Tr. 345). The District Court entered judgment for respondent, holding that the issue was properly submitted to the jury (Tr. 355-357). The Court of Appeals affirmed, holding that the disputed facts were properly left to the jury to resolve (Petition, page 3a-5a). The petitioner nevertheless seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Trial by jury was selected by the petitioner. The jury, under a charge by the court unchallenged as to the law (and, in fact, demanded by the petitioner) found for the respondent on the only theory of liability presented.

The District Court entered judgment for respondent on the jury's verdict.

The Court of Appeals for the Fifth Circuit, after reviewing the evidence, affirmed the judgment for respondent, honoring the jury's verdict as required by the Seventh Amendment. Specifically, the Court of Appeals relied upon

[1] The court will note that the petitioner has changed his theory in his petition. He now wants the whole "floor" considered (Petition, page 2), even though he admits that the testimony with regard to the "floor" was in conflict (Petition, page 2).

Atlantic & Gulf Stevedores v. *Ellerman Lines*, 369 U.S. 355, 358-359, which held that neither the Supreme Court "nor the Court of Appeals can redetermine facts found by the jury. . . ." Furthermore, the Court of Appeals had no difficulty in reconciling the answers to the special interrogatories made by the jury.

However, without even citing the *Ellerman Lines* case or really discussing the basis of the Court of Appeals decision, the petitioner seeks certiorari on the theory that the Supreme Court should disregard the jury's verdict and find facts as a matter of law. For this novel proposition he cites two cases, neither of which has any application.

In *Mahnich* v. *Southern Steamship Company*, 321 U.S. 96, a federal judge, sitting in admiralty, found as a fact that a defective rope had been provided to a seaman, but nevertheless entered judgment for the ship. The basis for decision, approved by the Court of Appeals, was dictum in an early Supreme Court case to the effect that a ship was not unseaworthy when some appliances were seaworthy. Certiorari was granted. The Court specifically noted that "a finding of seaworthiness is usually a finding of fact" and not reviewable in the Supreme Court, but, since the courts below had made a conclusion of law, review was proper. 321 U.S. at 98, 99. The court went on to overrule the dictum in the earlier case — which was recognized to be an anomaly. *Screws* v. *United States*, 325 U.S. 91, 112.

It is vital to note that in *Mahnich* the Supreme Court did not do what the petitioner claims. The Court did not make any *de novo* finding of fact. The judgment of the courts below was reversed on the basis of the fact found by the District Judge — that the rope was defective.

Similarly, the *Alaska Steamship Company* v. *Petterson*, 347 U.S. 396, was a *per curiam* decision based on an appeal

in admiralty. The Supreme Court did not make any findings of fact. All the Court did was to uphold the legal standard involved below.

The instant case is clearly not within the purview of the above decisions. First, the trier of fact found the dunnage board in question not to be defective. Second, neither court below made a conclusion of law, other than the well established doctrine that disputed issues of fact are to be resolved by the jury. Third, the instant case was a trial by jury on the civil side of the Federal Court's docket, not on the admiralty side.

While the granting of certiorari is, of course, discretionary, past decisions have indicated that the Court ordinarily refuses to review evidence and to discuss specific findings of fact. E.g., *United States v. Johnston*, 268 U.S. 220, 227; *General Pictures Co. v. Electric Co.*, 304 U.S. 175, 178; *NLRB v. Waterman SS Co.*, 309 U.S. 206, 208. A corollary is the "two court" doctrine, which militates strongly against reviewing evidence when findings of fact have been concurred in by the two courts below. E.g., *Corn Products Ref. Co. v. CIR*, 350 U.S. 46, 51; *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214; *United States v. Dickinson*, 331 U.S. 745, 751. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland Ed. 1951) § 333. In fact, when the Supreme Court does review evidence, it is in the situation where the lower court has taken the case away from the jury for judicial determination. See, e.g., *Maynard v. Durham, & S.R. Co.*, 365 U.S. 160; *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500. The effect of the Court's opinions in those cases was to vindicate — not to derogate from — the jury's verdict.

Petitioner's case presents the exact opposite situation. All he wants is an appellate fact finding, inconsistent with

the jury's, that this particular piece of lumber was unseaworthy.[2] To achieve that result, petitoner would have this Court undermine the many decisions, cited above, required to uphold the integrity of the jury's verdict against judges' efforts to substitute their view of the way the jury should have found the facts. Even the portions of the record selected by the petitioner for comment demonstrate a conflict in the testimony which could only be resolved by the jury.[3]

Thus, even if the Supreme Court should decide to review the evidence in this specific case and to review the findings of fact concurred in by a jury, a district judge, and three appellate judges, the Court would be bound by the Seventh Amendment to uphold the findings of the jury. As stated in *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, *supra*,

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." 369 U.S. at 364.

Petitioner's appeal to the appellate courts to save him from an adverse verdict after trial by jury (a risk so carefully explained to the longshoreman by Mr. Justice Black,

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[2] Apparently the petitioner considers the jury's verdict as being conclusive on whether the board actually broke. However, if the evidence is to be reviewed on the jury's verdict that the board was seaworthy, it is only fair that the evidence be reviewed on the issues answered favorably to the petitioner.

[3] Respondent will not burden the Court with a lengthy discussion of the evidence or with speculation as to which theory persuaded the jury. At this stage, the fact that the evidence satisfied the jury, the trial judge, and the appellate court should be conclusive. But, for example, the jury may have believed that no dunnage board was ever intended to support the weight of a man and a bale of cotton and that petitioner should have done his "cutting" on a barrelhead (See Petition, p. 4).

joined by the Chief Justice and Justices Douglas and Clark in *Ryan Stevedore Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 135, 140) should be futile. The protection incident to the institution of trial by jury, as guaranteed by the Seventh Amendment, is afforded equally to the parties in a law suit, plaintiff or defendant. The respondent has been vindicated by a jury whose verdict has been sustained by a District Court and a Court of Appeals. The matter should now be at an end.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should not be granted.

Respectfully submitted

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William C. Harvin

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Frank G. Harmon

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of March, 1963, a true and correct copy of this Brief in Opposition was served on Messrs. Mandell & Wright, 707 South Coast Building, Houston 2, Texas, by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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